Office-Supreme Court, U.S.
FILED
JUN 27 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-6263

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JAMES KIRKLAND BATSON, *Petitioner,*

v.

KENTUCKY, *Respondent.*

On Writ Of Certiorari To The Supreme Court Of Kentucky

BRIEF FOR PETITIONER

J. DAVID NIEHAUS
Deputy Appellate Defender of the
Jefferson District Public Defender
200 Civic Plaza
719 West Jefferson Street
Louisville, Kentucky 40202
(502) 587-3800
Counsel for Petitioner

FRANK W. HEFT, JR.
Chief Appellate Defender of the
Jefferson District Public Defender
Co-Counsel for Petitioner

DANIEL T. GOYETTE
Jefferson District Public Defender
Of Counsel

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

BEST AVAILABLE COPY

QUESTION PRESENTED

In a criminal case, does a state trial court err when, over the objection of a black defendant, it swears an all white jury constituted only after the prosecutor had exercised four of his six peremptory challenges to strike all of the black veniremen from the panel in violation of constitutional provisions guaranteeing the defendant an impartial jury and a jury composed of persons representing a fair cross section of the community?

TABLE OF CONTENTS

	Page
STATEMENT	i
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	4
ARGUMENT	5
CONCLUSION	35

TABLE OF AUTHORITIES

CASES: Page

Alexander v. *Louisiana*, 405 U.S. 625 (1972) 10
Avery v. *Georgia*, 345 U.S. 559 (1953) 10
Baron v. *Baltimore*, 7 Pet. 243 (1833) 8
Carter v. *Jury Commission*, 396 U.S. 320 (1970) 18
Commonwealth v. *Dorsey*, 7 Browne 412, 103 Mass. Rpts. 412 (1869) 21, 22, 23
Commonwealth v. *Soares*, 377 Mass. 461, 387 N.E.2d 499 (1979) 26
Duncan v. *Louisiana*, 391 U.S. 145 (1968) 11, 15, 25
Duren v. *Missouri*, 439 U.S. 357 (1979) 25
Eubanks v. *Louisiana*, 356 U.S. 584 (1958) 10
Ex Parte Virginia, 190 U.S. 339 (1880) 9
Fant v. *Buchanan*, 17 So. 371 (Miss., 1895) 9
Fay v. *New York*, 332 U.S. 261 (1947) 14, 15
Gaines v. *Washington*, 277 U.S. 81 (1928) 9
Glasser v. *United States*, 315 U.S. 60 (1942) 13, 16
Hill v. *Texas*, 316 U.S. 400 (1942) 10
Maxwell v. *Dow*, 176 U.S. 581 (1900) 9, 10
McCray v. *New York*, 461 U.S. 961 (1983) 11, 31, 33
In Re Murchison, 349 U.S. 133 (1955) 31
Neal v. *Delaware*, 103 U.S. 370 (1881) 10
Norris v. *Alabama*, 294 U.S. 587 (1935) 10
Oregon v. *Haas*, 420 U.S. 714 (1975) 33
People v. *Garbutt*, 17 Mich. 9 (1868) 12
People v. *Hall*, 197 Cal.Rptr. 71, 672 P.2d 854 (1983) .. 31, 32
People v. *Nurse*, 475 N.E.2d 1000 (Ill.App. 1 Dist., 1985) 34
People v. *Payne*, 99 Ill.2d 135, 457 N.E.2d 1202 (1983) .. 17
People v. *Wheeler*, 148 Cal.Rptr. 890, 583 P.2d 748 (1978) 4, 26, 27, 28, 29, 34, 35
Peters v. *Kiff*, 407 U.S. 493 (1972) 6, 19, 30
Pruneyard Shopping Center v. *Robbins*, 447 U.S. 74 (1980) 33
Rose v. *Mitchell*, 443 U.S. 545 (1979) 19
Sawyer v. *United States*, 202 U.S. 150 (1906) 22
Sealy v. *State*, 1 Kelly 213 (Ga. 1846) 21
Slaughterhouse Cases, 16 Wall 36; 84 U.S. 36 (1873) ... 9
Smith v. *Texas*, 311 U.S. 128 (1940) 10, 27
Sparf v. *United States*, 156 U.S. 51 (1894) 12

Table of Authorities—Continued

CASES: Page

State v. *Benton*, 19 N.C. 188 (1836) 22
State v. *Gilmore*, 199 N.J. Super. 389, 489 A.2d 1175 (1985)..... 18, 34
State v. *Wiley*, 698 P.2d 1244 (Ariz., 1985)..... 18, 34
Stilson v. *United States*, 250 U.S. 583 (1919)..... 23
Strauder v. *West Virginia*, 100 U.S. 303 (1880)..... 9, 17
Swain v. *Alabama*, 380 U.S. 202 (1965)..... 5, 6, 7, 10, 15, 18, 20, 21, 23, 27, 29, 33, 34
Taylor v. *Louisiana*, 419 U.S. 522 (1975)..... 4, 5, 6, 10, 15, 17, 18, 19, 25, 30
Thiel v. *Southern Pacific Co.*, 328 U.S. 217 (1946).... 13, 14
Turner v. *Fouche*, 396 U.S. 346 (1970)..... 18
Twitchell v. *Pennsylvania*, 7 Wall. 321, 74 U.S. 321 (1868) 8
United States v. *Clark*, 737 U.S. 679 (7th Cir., 1984)... 32
United States v. *Leslie*, 759 F.2d 366 (5th Cir., 1985) ... 8
United States v. *Marchant*, 12 Wheat 479 (1827)..... 22
United States v. *Shackelford*, 18 How 588 (1856)..... 22
Virginia v. *Rives*, 100 U.S. 313 (1880)..... 9
Walker v. *Sauvinet*, 92 U.S. 90 (1875)..... 9
Williams v. *Florida*, 399 U.S. 78 (1970)..... 25

CONSTITUTIONAL PROVISIONS:
United States Constitution, Amendments I-VIII 8
United States Constitution, Amendment VI 8
United States Constitution, Amendment VII..... 9
United States Constitution, Amendments XIII..... 9
United States Constitution, Amendments XIV 8

STATUTES AND RULES:
18 USCS § 243..... 19
18 USCS § 1861..... 8
Federal Jury Selection and Services Act of 1968, 28 USCS § 1861..... 16, 19
18 USCS § 1863..... 8
33 Edw. I, Stat. 4 (1305)..... 20,21
Fed.R.Evid. 404(b) 30
28 USC § 1257(3)..... 1

Table of Authorities—Continued

OTHER AUTHORITIES: Page

Babcock, Voir Dire: Preserving Its Wonderful Power, 27 Stan.L.Rev. 545 (1975) 33

The Origin of the Petty Jury, 27 Law Quarterly Review 347 (1911)..... 12

The Congress, the Court & Jury Selection . . . , 52 Va. Law Rev. 1069 (1966)..... 18

17 American and English Encyclopedia of Law, 2 ed., "Jury and Jury Trial", § 7(6), p. 1190-1191 (1898)... 21

24 Cyclopedia of Law and Procedure, "Juries", § 13(c), p. 311-312 (1907) 21

24 Cyclopedia of Law and Procedure, "Juries" §C(11) p. 352-353 (1907) 23

17 American and English Encyclopedia of Law, "Jury and Jury Trial", §5(b), p. 1178-1181 (1898) 23

II Wigmore, *Evidence*, § 302, Theory of Evidencing Intent, p. 241-247 (Chadbourne Rev., 1979) 28

26 Halsbury's Laws of England, 4 ed., para. 624; 626; p. 325-326 (1979) 21

2 Schwartz, The Bill of Rights: A Documentary History (1971)..... 23, 24

I Stephan, *History of the Criminal Law in England;* London (1883)..... 20, 21

2 LaFave and Israel: *Criminal Procedure, § 21.3(d) "Peremptory Challenges," p. 739 (1984)* 7

OPINIONS BELOW

The Supreme Court of Kentucky affirmed the Judgment entered against Petitioner in an unpublished opinion rendered on December 20, 1984. (App., p. 5). No written opinion was filed with the circuit court judgment of conviction entered on March 20, 1984.

GROUNDS OF JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 USC § 1257(3) because, as the question set out above shows, Petitioner claims that the rights to impartial jury and to a jury made up of a cross-section of the community under the Sixth and Fourteenth Amendments has been abrogated. The Supreme Court of Kentucky affirmed Petitioner's conviction in an unpublished opinion rendered on December 20, 1984. The Petition for Writ of Certiorari was filed on February 19, 1985, and was granted on April 22, 1985. The petition for writ was timely filed under Sup.Ct.R. 20.1.

CONSTITUTIONAL PROVISIONS INVOLVED

SIXTH AMENDMENT

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed***

FOURTEENTH AMENDMENT, Section One

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case was commenced by the return of Indictment No. 82-CR-0010 by the Jefferson County, Kentucky, Grand Jury on January 6, 1982. (Transcript of Record (TR), p. 1-3). That Indictment alleged that Batson committed the offenses of second degree burglary and receipt of stolen property valued at more than $100.00 (TR, p. 1). The Indictment charged also that Petitioner was a second degree persistent felony offender and liable to enhanced punishment upon conviction for the two substantive offenses.

In support of the first charge, the prosecution introduced a Mrs. Spencer who lived in the house where the break-in occurred. She saw Petitioner Batson crouched down in another room of her house. Then Batson and her purse containing watches, rings and cash disappeared. (Transcript of Evidence (TE), p. 19-22). The second charge was supported by the testimony of a pawnbroker who said that Batson and another pawned property taken from Mrs. Spencer. This was done shortly after the break-in. (TE, p. 135-139; 140). Trial was had in Jefferson Circuit Court on February 14-15, 1984. (TR, p. 211). Batson was convicted both of burglary and of receipt of stolen property. (TR, p. 212). Because he was found to be a persistent felony offender (TR, p. 212), Batson was sentenced to a term of 20 years imprisonment by Judgment dated March 20, 1984. (TR, p. 222-223).

The error complained of here occurred after the jury had been examined and challenged on voir dire and after the peremptory strikes had been made by counsel. (TE, p. 5; TR, p. 119-120). Batson's trial lawyer moved to discharge the panel on the ground that all four black jurors who had been included in the venire had been struck by the prosecutor's peremptory challenge and that an all-

white jury resulted. Under those circumstances, counsel continued, Petitioner was denied "his right to an impartial trial [sic], a cross-section of the community under the Sixth and Fourteenth Amendments. He's also being denied equal protection of the law under the United States Constitution. And he's also being denied a fair, impartial trial." (TE, p. 6; App., p. 3). Counsel then objected to the swearing of the jury. (TE, p. 7; App., p. 3).

In a colloquy with the prosecutor and with the trial judge, Batson's lawyer elicited the following statements:

> Does the Court agree—essentially, the facts I'd want to establish at a hearing are, number one, that there were four black jurors on the panel and that the Commonwealth exercised its pre-emptories [sic] as to those, all four black jurors.
>
> THE COURT: Well, they can do it if they want to.
>
> Q Do you accept that as true? Is that accurate, Mr. Gutmann?
>
> A Yeah, during this particular—yeah. I struck four blacks and two whites.
>
> Q Okay. And that this left an all-white jury. Is that right?
>
> A In looking at them, yes; it's an all-white jury. (TE, p. 7-8; App., p. 3).[1]

To Batson's renewed arguments about denial of equal protection of the law, of fair cross-section of the community and fair and impartial jury, the trial judge stated that those complaints were relevant only to the selection of the panel, not to the selection of the petit jury for a particular case. (TE, p. 7; App., p. 3-4). The objection to

---

[1] Batson is, of course, a black man. (TE, p. 171-173; also App., p. 6).

swearing the jury and the motion to set aside the panel were overruled. (TE, p. 8; App., p. 4). The jury was sworn and returned verdicts of guilty as to all three charges contained in the Indictment. (TE, p. 9; App., p. 4; TR, p. 211).

SUMMARY OF ARGUMENT

This brief is premised on the belief that the concept of the jury as a fair cross-section of the community announced in *Taylor* v. *Louisiana*, 419 U.S. 522 (1975), was designed to secure a trial jury that is representative of the community and not simply to create a representative panel or venire from which the prosecutor can exclude groups of people by means of peremptory challenges. Petitioner here proposes a remedy for improper use of peremptory challenges similar to that found in *People* v. *Wheeler*, 148 Cal.Rptr. 890, 583 P.2d 748 (1978), which permits a defendant to question the prosecutor's peremptory challenges when it appears that those challenges are being used to exclude a particular group of people. The remedy is required because none of the previous approaches to ending discrimination in the selection and empanelling of the jury has been satisfactory. The remedy proposed is based on a simple and well-known principle of evidentiary inference which at once provides a solution to the problem of discrimination by exclusion of groups and prevents undue restriction on the use of peremptory challenges by the prosecutor. As shown herein, the remedy proposed is simply to apply Wigmore's "doctrine of chances" on a reasonable scale to discern the intent of the prosecutor when he exercises his privilege of peremptory challenges. Where, as here, the prosecutor uses all or most of his peremptory challenges to remove black people from the jury, a reasonable inference arises that he may be excluding only on the basis of race and is

thus defeating, by means of state statutory privilege, the defendant's constitutional right to a representative jury. Present practice under *Swain* v. *Alabama*, 380 U.S. 202 (1965), forecloses any action on this inference. It is, therefore, necessary for the Court to declare that state practice with regard to peremptory challenge may be questioned by a criminal defendant in order to assure trial by a representative jury.

ARGUMENT

A PROSECUTOR IN A STATE CRIMINAL ACTION CANNOT USE PEREMPTORY CHALLENGES AFFORDED HIM BY STATE LAW TO EXCLUDE ALL OR MOST OF A READILY IDENTIFIABLE GROUP. SUCH EXERCISE OF PEREMPTORY CHALLENGES CREATES AN INFERENCE THAT THE CHALLENGES ARE BEING USED TO DENY THE ACCUSED A JURY REASONABLY LIKELY TO BE A FAIR CROSS-SECTION OF THE COMMUNITY.

(A) Introductory

This case squarely presents the question of whether the use by a state prosecutor of his peremptory challenges to remove all black persons remaining after challenges for cause from a jury panel denies a black defendant the right to a jury made up of a cross-section of the community. Proper disposition of the question requires application of existing law to cover the situation. The Court must state, precisely and clearly, that the cross-section of the community jury requirement made applicable to the states in *Taylor* v. *Louisiana*, 419 U.S. 522 (1975), includes the empanelling of the petit jury as well as the procedure by which the panels are composed. The guiding concept must be that the prosecutor, as agent for the state, cannot be allowed to interfere with the random and racially neutral

procedures by which a jury should be selected. In short, the Court must rule that the state may not do indirectly through the prosecutor what it cannot do directly through its jury commissioners. If the goal of jury composition and selection is to obtain a mix of persons of varied backgrounds and experiences, *Taylor* v. *Louisiana*, cited above; *Peters* v. *Kiff*, 407 U.S. 493, 503 (1972), then it is illogical and unreasonable to make a distinction between the acts of the jury commissioner who chooses only whites for jury service (which acts are promptly set aside) and the acts of the prosecutor who "fine tunes" the jury by removing the blacks who remain after challenges for cause are made. The Court in its recent cases has required racially neutral procedures where the securing of names and the initial qualification of jurors are concerned. The Court must require the same neutrality throughout the entire process of selection and empanelling.

In opposition to the claim for peremptory challenges free from racially discriminatory motives, the principle of *Swain* v. *Alabama*, 380 U.S. 202 (1965) is invariably cited. There, the Court noted without unfavorable comment that peremptory challenges were often exercised on the grounds of race, religion or nationality and that the Equal Protection Clause of the Fourteenth Amendment would not be employed to subject the prosecutor's use of peremptory challenges to examination in any one case. The Court held that such limitation would too greatly impair the usefulness of such challenges to the prosecutor. *Swain* v. *Alabama*, cited above, at 220-222. Successful attack on the improper use of peremptory challenges, under *Swain*, was put on a basis of showing that over a period of time the prosecutor had used the peremptory challenge time and again to exclude black people from petit juries. *Swain*, cited above, at 227. The result of this

ruling has been to foreclose successful challenge of improper use of peremptory challenges.

> Although courts are inclined to say that the defendant's burden of showing such systematic exclusion by the prosecutor 'is not insurmountable,' experience has clearly indicated the virtual impossibility' of doing so. A great many cases are to be found holding the defendant did not meet this burden, but there are almost none ruling that the defendant had established such systematic exclusion by the prosecutor's use of his peremptory challenges. This being so, courts have not had occasion to address the conundrum posed by this branch of *Swain:* whether, assuming proof of systematic exclusion, the prosecutor is now barred from using his peremptory strikes against black jurors, or whether it is then merely necessary that the prosecutor give some explanation for such strikes, such as that it is his view that black jurors would unduly favor a black defendant (the kind of contention, as noted earlier, which the peremptory challenge has served to keep out of sight). 2 LaFave & Israel, *Criminal Procedure* §21.3(d) "Peremptory Challenges," p. 739 (1984).

The lack of utility of the *Swain* rule, as evidenced by the continued complaints of racially discriminatory use of peremptory challenges, calls for reconsideration of the question disposed of in that case. Two significant decisions rendered by the Court since *Swain* was issued in 1965 provide the means to attack the improper use of peremptory challenges without unduly restricting their use by the prosecutor. And since no other means employed has worked to remove this problem, it is necessary to create a new rule by which the prosecutor's actions can be judged and regulated. To illustrate the desirability of the suggested change, it is necessary first to examine the alternatives that have been employed to attack the

problem. The lack of a workable alternative to the proposal made here demands adoption of the rule proposed in this brief.

(B) Equal Protection Analysis

At this point, it is useful first to distinguish the Court's role in relation to the states from that as the supervisory body of the federal court system. In the federal system, the problem of discriminatory use of peremptory challenges may be settled in the manner employed in *United States* v. *Leslie*, 759 F.2d 366 (5 Cir. 1985). There discriminatory use of peremptory challenges was disapproved in the interest of justice and under the supervisory power of the appeals court. *United States* v. *Leslie*, cited above, at 373. The Congress has also imposed a requirement that all litigants in a federal court who are entitled to a jury must have "grand and petit juries selected at random and from a fair cross-section of the community . . ." 18 USCS §1861. This right is secured by requirement that each district court devise and use a written plan to achieve the objectives of the act. 18 USCS §1863. And, of course, the Court may construe the Sixth Amendment to the Constitution to meet the problem of improper use of peremptory challenges. But, when the problem of improper use of peremptory challenges in state courts is raised, considerations of federalism are important. Historically, the response of the Court has been limited by the prevailing attitude toward federal intervention in what has long been perceived to be a "state" matter.

In *Baron* v. *Baltimore*, 7 Pet. 243 (1833), the Court held that Amendments 1-8 were applicable only to federal matters. The states were, therefore, free to regulate or even deny jury trial as they chose. Later, in *Twitchell* v. *Pennsylvania*, 7 Wall. 321, 74 U.S. 321 (1868), the *Sixth*

Amendment right to jury trial was considered and held applicable only to federal trials. The enactment of the Fourteenth Amendment did not affect the prevailing view of the Sixth Amendment right to jury trial (e.g. *Fant* v. *Buchanan*, 17 So. 371 (Miss. 1895); *Walker* v. *Sauvinet*, 92 U.S. 90 (1875), Seventh Amendment case). As late as 1928, the Court held that the Sixth Amendment applied to federal matters only. *Gaines* v. *Washington*, 277 U.S. 81, 85 (1928). It is against this background that the line of cases which culminated in *Swain* developed.

Blacks in the South after the Civil War relied on the various civil rights bills and on the provisions of the newly adopted Thirteenth and Fourteenth Amendments, the latter of which guaranteed due process of law and equal protection of the laws, to protect their rights. The common belief at the time was that a jury trial was not a component of due process of law. In 1900, the Court so held in *Maxwell* v. *Dow*, 176 U.S. 581, 603 (1900). Therefore, blacks seeking relief from discriminatory practices could proceed only on the theory of privileges and immunities as citizens of the United States [which was dispatched in the *Slaughterhouse Cases*, 16 Wall. 36, 84 U.S. 36 (1873)] or the theory of denial of equal protection of the laws. Proceedings under the equal protection theory resulted in three cases which formed the basis of all subsequent actions. The three cases, *Strauder* v. *West Virginia*, 100 U.S. 303 (1880); *Virginia* v. *Rives*, 100 U.S. 313 (1880); and *Ex Parte Virginia*, 100 U.S. 339 (1880), established the rule that if the state enacted laws which kept blacks off of juries, a black defendant was denied equal protection of the law *(Strauder)*, but that if an agent of the state disobeyed state laws in order to discriminate, "it ought to be presumed that the [state] court will redress the wrong." *Virginia* v. *Rives*, cited above, at 321-322. In essence, the Court declined to interfere in cases where

agents of the state discriminated against blacks unless the agents were following an improper law. This rule was changed by language in *Neal* v. *Delaware*, 103 U.S. 370 (1881), which held that the action of the agent was deemed the action of the state. *Neal* v. *Delaware*, cited above at 397. However, it has never doubted that the right of the citizen of a state to jury trial was to be protected in the first instance by the state. *Maxwell* v. *Dow*, 176 U.S. 581, 593 (1900). Throughout the twentieth century, cases involving discrimination in the selection of juries were handled under these principles.

> Whenever by any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States. * * * The principle is equally applicable to a similar exclusion of negroes from service on petit juries. * * * And although the state statute defining the qualifications of jurors may be fair on its face, the constitutional provision affords protection against action of the State through its administrative officers in effecting the prohibited discrimination. *Norris* v. *Alabama*, 294 U.S. 587, 589 (1935).

Under this rule, the obvious cases of discrimination were disposed of. *Hill* v. *Texas*, 316 U.S. 400 (1942); *Smith* v. *Texas*, 311 U.S. 128 (1940); *Avery* v. *Georgia*, 345 U.S. 559 (1953); *Eubanks* v. *Louisiana*, 356 U.S. 584 (1958); *Alexander* v. *Louisiana*, 405 U.S. 625 (1972). Yet none of these cases considered to any significant degree the question of peremptory challenges as a discriminatory device. It is implicit in each of the decisions cited that a fairly constituted jury panel is all that a defendant needs and that a

fairly constituted panel necessarily results in a fair trial jury. *Swain* v. *Alabama* is another case of this type. 380 U.S. 202, 203-204 (1965). *Swain* was in part a case applying the rule set out above. 380 U.S. at 205. In *Swain*, the Court also considered the effect of peremptory strikes under the Alabama system which removed all blacks from the jury panel. At that time, the Court decided that the free exercise of peremptory strikes by the Alabama prosecutor should not be questioned in any individual case.

> The persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury. 380 U.S. at 219.

The Court refused "to subject the prosecutor's challenge in any particular case to *the demands and traditional standards of the Equal Protection Clause . . .*" 380 U.S. at 221. To justify inquiry into the prosecutor's motives for peremptory strikes or challenges under the Equal Protection Clause, the Court ruled, ". . . the defendant must, to pose the issue, show the prosecutor's systematic use of peremptory challenges against Negroes over a period of time." *Swain* v. *Alabama*, cited above, at 227. The rule has effectively ended the employment of the Equal Protection Clause to combat improper use of peremptory challenges by the prosecutor. (See collection of comments and articles in *McCray* v. *New York*, 461 U.S. 961, 964, n.1 (1983). However, *Swain* was decided before the rendition of *Duncan* v. *Louisiana*, 391 U.S. 145 (1968); and *Taylor* v. *Louisiana*, 419 U.S. 522 (1975), which cases completed a line of opinions establishing the right of all persons to a jury composed of a cross-section of the community. The application of the cross-section idea to state jury trials shows the irrelevance of the *Swain* analysis to the present case and the need to condemn the actions by the prosecutor in the present case.

(C) Fair Cross-Section Analysis

The idea of the jury as a cross-section or representative of the community from which it is composed is not new. At common law, it is thought, the petty jury was formed by selecting representative members of the presentment (indicting) juries.

> By this means a larger representation of the whole county could be secured, and thus a fairer estimate placed upon the merits of the case, and a truer verdict given, without having to enlarge the jury by increasing the number until it became too bulky; that is, it was a simple system of representation of the representatives; the presentment juries being representatives of the hundreds and vills, and the petty or trial jury representative of the presentment juries. 27 LAW QUARTERLY REVIEW, "The Origin of the Petty Jury," 347, 358 (1911).

In the United States, the idea of the representative jury was not questioned. In 1771, John Adams wrote

> Juries are taken by lot or by sufferage, from the mass of the people, and no man can be condemned of life or limb or property or reputation without the concurrence of the voice of the people. *Sparf* v. *United States*, 156 U.S. 51, 143 (1894).

And the states also adopted the concept. In *People* v. *Garbutt*, 17 Mich. 9, 27 (1868), Judge Cooley wrote

> The trial of criminal cases is by a jury of the country, and not by the court. The jurors, and they alone, are the judge of the facts, and weigh the evidence. The law has established this tribunal because it is believed that, from its numbers, the mode of their selection, and the fact that the jurors come from all classes of society, they are better calculated to judge of motives, weigh probabilities, and take what may be called a common sense view of a set of circumstances, involving both act and intent, than any sin-

> gle man, however pure, wise and eminent he may be. This is the theory of the law; and as applied to criminal accusations, it is eminently wise, and favorable alike to liberty and to justice.

Therefore, the cases of this Court striking down, on Sixth Amendment grounds, jury selection techniques which did not comport with this idea are in keeping with the long tradition of representative or cross-section juries.

In *Glasser* v. *United States*, 315 U.S. 60 (1942), the Court held that the "notion" of what constitutes a proper jury is "inextricably intertwined" with the idea of jury trial, 315 U.S. at 85. The Court refused to be bound entirely by historical concepts of the jury or jury trial but instead held

> Our notions of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government. For 'It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community' (citation omitted).
>
> * * *
>
> And, its exercise must always accord with the fact that the proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a 'body truly representative of the community' and not the organ of any special group or class. 315 U.S. at 85-86.

The term "cross-section" of the community was explained in *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217 (1946), by stating what the term does and does not comprehend.

> This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of

> the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury. 328 U.S. at 220.

At about the same time, the Court noted the difference between cases presented on the Sixth Amendment theory and cases presented from state courts pursuant to the Equal Protection Clause. In *Fay* v. *New York*, 332 U.S. 261, 282 (1947), the Court noted that the defendants in that case relied on the equal protection cases cited in part B of this brief to attack the composition of a "blue-ribbon" jury made up under a New York law. There the Court held that it would not interfere with the New York process of jury selection out of a sense of self-restraint and because the long history of unhappy relations between the two races has caused the Congress to put those cases "in a class by themselves." 332 U.S. at 282. The Court found significance in the fact that it had never interfered with the composition of state court juries except where the guidance of the Congress was available. 332 U.S. at 283. Thus, it was noted, the Fourteenth Amendment did not prohibit the state from excluding certain occupational groups. In a footnote, the Court declined to speculate whether the due process of law clause of the Fourteenth Amendment would prohibit racial discrimination in the selecting of state court juries. *Fay* v. *New York*, 332 U.S. at 284, fn.27. Thus, in this opinion, the Court foreclosed consideration of Sixth Amendment requirements as to

state juries or the use of the due process clause to solve the problem of discrimination in the selection of jurors. 332 U.S. at 287. The separation of theories continued throughout the period in which *Swain* v. *Alabama* was decided.

This intellectual climate was changed radically by the decision in *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), which, relying on the Due Process of Law Clause of the Fourteenth Amendment, held that the right to jury trial is basic in the American system of jurisprudence and that, therefore, the Fourteenth Amendment "guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee." *Duncan* v. *Louisiana*, cited above, at 149. The reason for jury trial was declared to reflect "a profound judgment about the way in which law should be enforced and justice administered."

> A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. 391 U.S. at 155.

The right to require a jury verdict was considered to provide a recourse to the common sense of the community in preference to reliance on the judgment, for good or ill, of one judge or even a group of judges. 391 U.S. at 156. Because jury trial is so basic to American values, the Court held, the demand for jury trial must be respected by the states.

The years following *Duncan* have seen a number of decisions refining the concept of jury trial under the Fourteenth Amendment. Obviously, the most important opinion for purposes of this case is *Taylor* v. *Louisiana*, 419 U.S. 522 (1975). The issue there was stated to be

> Whether the presence of a fair cross section of the community on venires, panels or lists from which

> petit juries are drawn is essential to the fulfillment of the Sixth Amendment's guarantee of an impartial jury trial in criminal prosecutions. 419 U.S. at 526.

Relying on previous cases and upon the expression of policy found in the Federal Jury Selection and Service Act of 1968 (28 USC §1861 et. seq.), the Court held that

> . . . the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial. 419 U.S. at 528.

The cross-section is required to provide a prophylaxis against the exercise of arbitrary power by those charged with the administration of criminal justice. Excluding identifiable groups from service or restricting selection for service to certain special groups "cannot be squared with the constitutional concept of jury trial." 419 U.S. at 530.

It should be observed at this point that the holding and reasoning in *Taylor* are the products of a continual process of increasing the participation of all groups in the community in the judging of a defendant's guilt or innocence. This process began in feudal times in England when representatives of the knights of the hundreds and of the neighboring vills were called together to form the petty jury. And as noted in *Glasser* v. *United States*, 315 U.S. 60 (1942), the notions of the constitution of proper juries have developed with the "basic concepts of a democratic society and a representative government" *Glasser* v. *United States*, cited above at 85. It is this evolutionary growth of the concept of the ideal jury together with the constitutional requirement of a representative jury that demand statement of a rule prohibiting a state prosecutor from striking black people from a jury panel by means of peremptory challenges. In short, the Court should

extend the rule of *Taylor* by holding explicitly that the Sixth Amendment prohibits the use of peremptory strikes by a prosecutor to exclude all or most members of an identifiable class from participation as jurors. Further, it should be held that such action creates an inference that the challenges are used for improper purposes and that such acts so diminish the chance of a trial jury reasonably likely to represent a cross-section of the community that the jury must be discharged or the prosecutor required to explain his actions. The need for this rule is evident.

(D) Failure Of Previous Attempts To Resolve The Problem

A review of the decisions of this Court shows that all previous attempts to solve the problem of discrimination in the selection of juries have sought to do so indirectly, by providing for a pool of prospective jurors of such diverse character and of such numbers that it would be improbable that the prosecutor or any other court official could affect the representative character of the jury. This seems to have been the animating idea of both the equal protection cases arising from *Strauder* v. *West Virginia*, 100 U.S. 303 (1880), and the fair cross-section cases which resulted in *Taylor* v. *Louisiana*, 419 U.S. 522 (1975). However, from the continued stream of complaints about discrimination in the use of peremptory challenges, it is patent that creation of a satisfactory panel from which to choose is not sufficient to prevent violation of the right to a representative jury. An example of the prevelance of the problem is found in a dissent filed in *People* v. *Payne*, 99 Ill.2d 135, 457 N.E.2d 1202, 1210 (1983). In that case, the dissenting justice listed 33 appellate cases that had alleged improper use of peremptory challenges, 23 of which had been filed since 1980. As shown by the Appendix to the Petition for Certiorari filed in this case, 24 states have had occasion to rule on the question presented

here since 1980. Appendix to Petition for Writ, pgs. 19-20. Since the Petition was filed in February, 1985, two other states, New Jersey and Arizona, have considered and ruled on cases involving the issue presented here. *State* v. *Gilmore*, 199 N.J.Super. 389, 489 A.2d 1175 (1985); *State* v. *Wiley*, 698 P.2d 1244 (Ariz., 1985). Clearly, the means adopted under either *Swain* or *Taylor* to correct abuses in the summoning of jurors do not prevent the perception that prosecutors can still pack a jury by striking the members of a group who show up for voir dire.

Other remedies proposed by the Court also attack the problem indirectly. In *Carter* v. *Jury Commission*, 396 U.S. 320 (1970), and *Turner* v. *Fouche*, 396 U.S. 346 (1970), the Court pointed out that the problem of discrimination might also be attacked by suits for injunction filed by those persons who have been wrongfully excluded from jury service. However, this remedy is of little use to the individual defendant. The benefit of juror suits would lie in the eventual cessation of discriminatory practices. However, in the meantime, the defendant would still suffer from the improper acts of the prosecutor.

Nor is there much hope that legislation might cure the problem. Only one serious effort has ever been made in this area. Title II of the proposed Civil Rights Bill of 1966 was drawn by the Justice Department in such a way as to allow the United States Attorney General to institute civil proceedings in federal district courts to eliminate discrimination in state court jury selection procedures. §203 of that bill would have allowed injunctive relief and would have permitted suspension of any state practice if it violated the prohibition of discrimination found in §201 of the Bill. 52 Virginia Law Review 1069, "The Congress, the Court and Jury Selection," p. 1084-1085 (1966). Whatever effect the Bill might have had was lost when both

Titles I and II of the Bill failed of passage.[2] Of course, since 1875, it has been a federal crime for any state officer charged with the selection or summoning of jurors to exclude or fail to summon any person because of improper racial reasons. 18 USCS §243. This statute has had no appreciable effect on the problem discussed here despite the Court's recent gloss on the statute in *Peters* v. *Kiff*, 407 U.S. 493 (1972). No other legislative attempts to correct discriminatory abuses have been made.

The continued existence of claims of discriminatory use of peremptory challenges in the states leads inevitably to the conclusion that the remedies adopted by the Court do not deal with the problem that exists. The prosecutor is still able, by means of his peremptory challenges, to frustrate the ideal of a representative jury made up of a cross-section of the community. As the Court recognized in a different context in *Rose* v. *Mitchell*, 443 U.S. 545, 558-59 (1979)

> For we also cannot deny that, 114 years after the close of the War Between the States . . . racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole. Perhaps today that discrimination takes a form more subtle than before. But it is not less real or pernicious.

The rules enunciated in *Taylor* v. *Louisiana* and the other cases decided since 1968 deal admirably with the problem of keeping readily identifiable and often discriminated against groups off of the jury panel. However, the use of peremptories by a prosecutor presents a different problem that requires more particular treatment. The rule is

---

[2] Title I was resurrected and in 1968 was enacted as the Federal Jury Selection and Service Act of 1968. 28 USCS §1861.

to be fashioned by consideration of the prosecutor's purported right to peremptory challenge and the extent to which that "right" shall be allowed to frustrate the goal of a representative jury.

(E) The Prosecutor's "Right" Of Peremptory Challenges

The starting point for this examination is, of course, *Swain* v. *Alabama*, 380 U.S. 202 (1965), the case which is invariably and incessantly cited on the matter of peremptory challenges. In *Swain* it was held that the prosecutor has had for a long time a right of peremptory challenge in criminal trials, 380 U.S. at 214-218, and that the persistence and extensive use of the challenge demonstrate that peremptory challenge "is a necessary part of trial by jury." 380 U.S. at 219. However, it is important to reexamine the historical argument made in favor of the "right" of prosecutors to peremptory challenges. As shown below, the right of prosecutors in the United States to challenge jurors without statement of cause and without the possibility of denial by the trial judge is of recent vintage and in many states is not more than 125 years old.

The conventional wisdom on the matter is premised on comments made by Sir James Stephen in his *History of the Criminal Law in England*, published in London in 1883. Stephan discussed the effect of the enactment 33 Edw. I Stat. 4 (1305) which denied the Crown the right to challenge peremptorily but instead required showing of cause for each person challenged by the Crown. I Stephan, *History*, p. 302. Stephan did not doubt the existence of the defendant's right to peremptory challenges. The statute of 33 Edward I received a settled construction which allowed the Crown to "stand aside" jurors and not state cause until after the entire panel had been gone through. I Stephen, *History*, p. 303. In England, the same

procedure for challenging the jury still obtains. 26 Halsbury's Laws of England, 4 ed., para. 624; 626, p. 325-326 (1979). However, it is generally admitted that the right to stand aside was exercised sparingly. I Stephan, *History*, p. 302; 303. But, the exercise of challenge under the statute would, if a very large number of jurors were returned, "give the Crown what is nearly equivalent to a right of peremptory challenge." In *Swain* v. *Alabama*, 380 U.S. at 212, it was noted the "peremptories on both sides became the settled law of England, continuing in the above form until after the separation of the colonies." However, it is less important to know how the right survived in England than to know how the idea was received by the states at the time the Constitution and the Bill of Rights were adopted.

It appears that the right to stand aside was adopted only in the states of North Carolina, Pennsylvania and South Carolina. These are the only states in which the practice is known to have been followed. 24 *Cyclopedia of Law and Procedure*, "Juries," §13, C, p. 311-312 (1907); 17 *American and English Encyclopedia of Law*, 2 ed., §7, (6), p. 1190-1191 (1898). It is possible that the practice under 33 Edw. I, Stat. 4 was adopted by the various reception statutes or constitutional provisions enacted by the states in the 18th Century. (e.g. *Sealy* v. *State*, I Kelly 213 (Ga., 1846). However, there is no indication that the standing aside statute enjoyed general acceptance in the United States. This is illustrated by the reported argument of the Attorney General in *Commonwealth* v. *Dorsey*, 7 Browne 412, 103 Mass. Rpts. 412 at 416-47 (1869). After listing the 33 states and territories that provided by statute for peremptory challenges, the Attorney General then noted that the practice of standing aside jurors "has been said by some to be a part of the common law of this country; and it is adopted in South Carolina and perhaps

in others of the few states where the right is not conferred expressly by statute." In federal courts, the right to stand aside was recognized in *United States* v. *Marchant*, 12 Wheat. 479 (1827), but was limited to cases in which the local practice allowed it. *Marchant*, 12 Wheat. at 483; *United States* v. *Shackelford*, 18 How. 588 (1856); *Sawyer* v. *United States*, 202 U.S. 150 (1906). Therefore, evidence of general adoption of the right to stand aside is doubtful. Even where the right to stand aside was specifically recognized, the right was subject to the regulation of the trial court. In *State* v. *Benton*, 19 N.C. 188, 197 (1836), it was held that

> It may not be amiss to remark, that the practice of permitting the prosecuting officer to defer showing his cause of challenge to the excepted jurymen, until the panel be gone through, must be exercised under the supervision of the court, who will restrain it if applied to an unreasonable number.

Therefore, it is difficult to conclude that the right to stand aside as practiced in the United States after the adoption of the Constitution was the equivalent of a peremptory challenge for the prosecutor. In some situations, doubtless the right did amount to peremptory exclusion. But it is simply impossible to state that in all cases or that in all states that a prosecutor had the right to stand aside. From this, it follows that the right of the prosecution to challenge peremptorily was gained first by the statutes enacted by the Congress and by the various states.

As to peremptory challenges, the historical sources are more plentiful and, therefore, conclusions about the statutory grant of peremptory challenges to the prosecutor are more sure. *Commonwealth* v. *Dorsey*, 7 Browne 412, 103 Mass. Rpts. 412 (1869), provides a listing of the right to peremptory challenges of 33 states and territories. 103

Mass. Rpts. 416-417. Only three states were listed as providing the right to stand aside. 103 Mass. Rpts. at 417. From examination of this list and of the cases listed in 24 Cycl. of Law and Procdedure, "Juries," §C(11), p. 352-353 (1907); and 17 *Am and Eng. Encycl. of Law*, "Jury and Jury Trial," §5(b), p. 1178-1179; 1181 (1898), it seems evident that the majority of statutes granting peremptory challenges to defendants also granted peremptory challenges (usually fewer in number) to the prosecutor. Therefore, it is true that by 1870, the prosecutor in most states had a statutory right of peremptory challenge. *Swain* v. *Alabama*, 380 U.S. at 216. But this is not to say that the right of the prosecutor is at all comparable to that possessed by the defendant.

The historical right of the defendant to challenge jurors peremptorily has not been questioned in any of the literature tracing the development of peremptory challenge. Of course, the older case of *Stilson* v. *United States*, 250 U.S. 583, 586 (1919), baldly states that "there is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges to defendants in criminal cases; trial by an impartial jury is all that is secured." This statement must be read against the background of the proposed constitutional amendments at the first Congress which would have made the federal government the guarantor of the right to jury trial in the states and would have secured the right of challenge as it existed at the time.[3] James Madison proposed to substitute for the present jury trial clause (Article III, §2) a clause that would preserve the right of challenge. 2 Schwartz, *The Bill of Rights, A Documentary History*, p. 1027 (1971)

---

[3] Counsel for Petitioner does not have access to a copy of the Annals of Congress. Therefore, citations are taken from the source named in the body of the brief, which excerpt from the Annals.

(hereafter "*Schwartz*"). As an extension of the *Ex Post Facto* clause (Article I, §10), Madison proposed a third clause that "No state shall violate the equal rights of . . . trial by jury in criminal cases." 2 *Schwartz*, p. 1027. His argument was that the State governments were as likely to attack a citizen's rights as was national government. 2 *Schwartz*, at 1033. Neither the right to challenge nor the requirement that the states safeguard the right to jury trial were adopted. 2 *Schwartz*, p. 1123; 1154. Therefore, neither became a part of the Constitution. However, it is clear that at the time there was at least some demand for both provisions, especially the right of the defendant to challenge. Both Virginia and North Carolina recommended similar provisions as amendments to the Constitution. The Virginia provision reads

> 15th That, in criminal prosecutions, no man shall be restrained in the exercise of the usual and accustomed right of challenging or excepting to the jury. 2 *Schwartz*, p. 844.

North Carolina recommended

> 16. That, in criminal prosecutions, no man shall be restrained in the exercise of the usual and accustomed right of challenging or excepting to the jury. 2 *Schwartz*, p. 970.

From this short history, it may seem that the right of the defendant to challenge peremptorily in criminal cases has always been recognized and advocated. There is in this advocacy a realization that the defendant who faces the state in a criminal proceeding does not compete on terms of equality and, therefore, is entitled to consideration. Peremptory challenges along with challenges for cause serve to obtain a jury that is not biased and which makes the defendant feel comfortable, if that is possible. As is shown later in this brief, it is still the function of the

peremptory challenge to remove from the jury those persons whose impartiality is in doubt.

It may well be that the defendant's right to peremptory challenge will be denied protection by the due process clause of the Fourteenth Amendment when that issue is presented to the Court. *Duncan* v. *Louisiana*, 391 U.S. 145, 148-150 (1968). Some aspects of jury trial have been refused protection under this type of analysis [e.g. *Williams* v. *Florida*, 399 U.S. 78 (1970)]. However, it is unimportant in this case to determine whether the defendant is entitled to federal protection of his right to challenge jurors peremptorily. The essential conclusion to reach is that the statutory grant to a state prosecutor of a number of peremptory challenges is just that. There is no way in which to contort the Constitution or interpret history to make a federal constitutional right for the prosecutor to have peremptory challenges. Neither the Sixth nor the Fourteenth Amendment provide constitutional protection for a state. The grant of peremptory challenges to the prosecutor by the states is of relatively recent occurrence. Therefore, it must be concluded that the "right" of the prosecutor to strike peremptorily in non-existent. Rather, the prosecutor is allowed to make peremptory challenges as a matter of legislative grace. If the prosecutor misuses his privilege to deny a defendant a jury that reasonably represents the community, there can be no doubt that the prosecutor's privilege to challenge must be restricted. In *Duren* v. *Missouri*, 439 U.S. 357, 368 (1979), and *Taylor* v. *Louisiana*, 419 U.S. 522, 533-535 (1975), the court held then when the right to a jury drawn from a cross section of the community is shown to be denied, the state must justify its infringement of the right by demonstrating that the infringement serves a significant state interest. The same rule must apply in the present case. The privilege to challenge peremptorily is

not of sufficient importance or utility to allow its improper use to go unchecked and unreproved. The constitutional right to representative jury should not be abridged in favor of the exercise of a state statutory privilege.

(F) Remedy

To a large extent, the remedy to be applied in this and similar cases is suggested by two state court cases, *People* v. *Wheeler*, 148 Cal.Rptr. 890, 583 P.2d 748 (Cal., 1978), and *Commonwealth* v. *Soares*, 377 Mass. 461, 387 N.E.2d 499 (1979). These cases, relying on state constitutional grounds, held that the use by a prosecutor of peremptory challenges to remove prospective jurors solely on the ground of group bias, violates the right to a jury drawn from a representative cross-section of the community. *People* v. *Wheeler*, 583 P.2d at 762. The remedy fashioned may be described as follows. First, the prosecutor's presumption of rectitude is retained. *Commonwealth* v. *Soares*, 387 N.E.2d at 517; *People* v. *Wheeler*, 583 P.2d at 763. If the defendant claims that the prosecutor is using his allotment of peremptory challenges to exclude jurors on the basis of race, he must timely object and satisfy the trial judge that the use of peremptories is improper. *Wheeler*, 583 P.2d at 764. This is done by showing that the excluded jurors are members of a cognizable group within the meaning of the cross-section of the jury rule and that, under all circumstances known in the case, there is a "strong likelihood" that the jurors are being excluded "because of their group associations rather than any specific bias." *Wheeler*, 583 P.2d at 764. If the trial judge is convinced that the defendant has met his initial burden, the prosecutor must then go forward and show, again under the totality of circumstances, that his reasons for challenge were based on matters other than the race or other group association of the excluded jurors. "The show-

ing need not rise to the level of a challenge for cause." *Wheeler*, 583 P.2d at 764-765. If the prosecutor fails in his showing, then the entire panel or venire must be dismissed.

The proposed rule does no more than permit exploration of a claim that the agent of the state is misusing peremptory challenges to defeat a federally protected right. Under the existing precedents, inquiry is foreclosed. *Swain* v. *Alabama*, 380 U.S. 202, 223 (1965). It is by now apparent that the remedy created by the Supreme Court of California is no more than the application on a proper scale of Wigmore's "doctrine of chances." Examination of the equal protection cases like *Swain*, 380 U.S. 202 (1965), and earlier cases like *Smith* v. *Texas*, 311 U.S. 128 (1940), show that this method of evidentiary inference is common to this type of analysis. In *Swain*, the Court declined to examine the actions of a state prosecutor in any particular case, but did agree with petitioner in that case that systematic exclusion over a period of years by the same prosecutor would negate the presumption that the prosecutor was acting properly in any one case. 380 U.S. at 222-223; 227-228. In *Smith* v. *Texas*, the Court noted that the Texas scheme for jury selection was not unfair on its face and that it could be used fairly. 311 U.S. at 130. The jury commissioners testified that they did not discriminate against blacks in the selection of the jury. 311 U.S. at 131. However, the Court reversed the conviction holding that

> Chance and accident alone could hardly have brought about the listing for grand jury service of so few negroes from among the thousands shown by the undisputed evidence to possess the legal qualifications for jury service. Nor could chance and accident have been responsible for the combination of circumstances under which a negro's name, when listed at

> all, almost invariably appeared as number 16, and under which number 16 was never called for service unless it proved impossible to obtain the required jurors from the first 15 names on the list. 311 U.S. at 131.

This line of argument clearly parallels the explanation of the "doctrine of chances" set out in II Wigmore, Evidence, §302, "Theory of Evidencing Intent," p. 241-247 (Chadbourne Rev. 1979):

> The argument here is purely from the point of view of the doctrine of chances—the instinctive recognition of that logical process which eliminates the element of innocent intent by multiplying instances of the same result until it is perceived that this element cannot explain them all.

The author goes on to explain that

> It is not here necessary to look for a general scheme or to discover a united system in all the acts; the attempt is merely to discover the intent accompanying the act in question; and the prior doing of similar acts, whether clearly a part of a scheme or not, is useful as reducing the possibility that the act in question was done with innocent intent. The argument is based purely on the doctrine of chances, and it is the mere repetition of instances, and not their system or scheme, that satisfies our logical demand. II, Wigmore, §302, p. 245.

Therefore, the repetition of similar events permits the inference that the acts are not done with innocent intent. This rule was recognized in substance, if not by name, by the Supreme Court of California in its *Wheeler* case. In that case, the intricate statistical models developed over the past few years were rejected and "more traditional procedures" were employed. *People* v. *Wheeler*, 583 P.2d at 763-764. That court first recommended the creation of the best record possible and demanded proof that the persons

excluded were members of a group cognizable within the representative cross-section rule. After these preliminaries, the accused was required, from all the circumstances of the case, to

> . . . show a strong likelihood that such persons are being challenged because of their group association rather than because of any specific bias. 148 Cal. Rptr. 905; 583 P.2d 764.

Under this rule, the accused may show the likelihood of bad intent, in the first instance, by showing that the prosecutor has struck all or most members of a group or that he has used a disproportionate number of challenges against the group and that the only shared characteristic of the challenged jurors is their membership in the group. 583 P.2d at 764. It is obvious that the California court recognized the effect of the doctrine of chances. The difference between the rule set out in *Wheeler* and that set out in *Swain* is nothing more than a difference in scale. *Swain* required similar acts by the prosecutor year after year to evidence his bad intent. *Wheeler* adopts the more reasonable view that intent can be discerned from the acts of the prosecutor in a single proceeding. Of the two cases, *Wheeler* more correctly applies the doctrine of chances because it does not require more than a showing of repeated similar acts while *Swain* requires a showing of ". . . the prosecutor's systematic use of peremptory challenges against Negroes over a period of time." 380 U.S. at 227. The Court should require no more stringent showing of improper challenges than that required by *Wheeler*.

There can be no fair objection to the rule set out in *Wheeler* and proposed for acceptance by this Court. Surely, the evidentiary rule set out in *Wheeler* should be capable of administration by state trial judges. These judges see the same principle used often in the trial-in-

chief of criminal cases to establish the guilty intent of the defendant. The matter is largely left to their discretion during the trial-in-chief. There is no reason to distrust their competence to handle the rule before trial.[4] Nor may the prosecutor fairly complain about limitations to his peremptory challenges under the rule. It is unlikely that the prosecutor will be called on to explain his challenges if he strikes one or two black jurors from a panel of twenty-five or thirty. Barring the existence of some other circumstances, the doctrine of chances would not give rise to an inference of discriminatory intent. However, as the prosecutor strikes more black people peremptorily, the only reasonable conclusion would be that he or she is doing so to remove all blacks from the panel. This conclusion would be confirmed or dissipated by the other circumstances present in the case. If a reasonable suspicion of bad intent is created, then the prosecutor should be called to account. The proposed remedy only permits the defendant to question questionable acts, it does not guarantee him a new jury panel every time an objection is made. Rather, it allows the defendant to object when the prosecutor uses a state-created privilege to remove a recognizable group from the jury and thus deny him the constitutionally required benefit of a jury composed of person with varied experiences and backgrounds. *Peters* v. *Kiff*, 407 U.S. 493, 503-504 (1972); *Taylor* v. *Louisiana*, 419 U.S. 522, 527-528 (1975). For these reasons, no valid objection can be made to the proposed remedy.

As shown by the experiences of California, the rule is not unworkable nor does it unduly embarrass the prosecutor in the use of his peremptory challenges. In *People*

---

[4] Presumably, federal judges could operate under the rule as well. Fed. R. Ev. 404(b)

v. *Hall*, 197 Cal.Rptr. 71, 672 P.2d 854 (1983), the California Supreme Court expressed its satisfaction with the rule and noted that no empirical evidence had been adduced to sustain criticism of the rule. *People* v. *Hall*, 197 Cal.Rptr. at 76; 672 P.2d at 859. The chief complaint leveled at the rule is that the peremptory challenges of the prosecutor are somehow not really peremptory any more. But, as shown in Section D of this brief, the prosecutor's "right" to peremptory challenges is instead a privilege granted by the legislature. The privilege of peremptory challenge is quite properly subordinated to the acknowledged right of the defendant to face a jury reasonably representative of the community. No court should stand by idly and observe an agent of the state act in a manner that gives the appearance of intentional discrimination against a particular group. Justice must satisfy the appearance of justice. *In Re Murchison*, 349 U.S. 133, 136 (1955). It is senseless to obtain a jury panel that approximates a cross section of a community only to allow the prosecutor by means of his peremptory challenges to diminish or destroy that cross section. *McCray* v. *New York*, 461 U.S. 961, 968 (1983), Marshall, J., dissent from denial of certiorari. The effect of a prosecutor seen by the public removing all blacks from a jury panel cannot be underestimated. The trial judge who sits by while all blacks who survived challenge for cause are dismissed from the panel and sent back to the jury pool must also be looked at askance by the defendant, the witnesses and the public, but in most jurisdictions, he is powerless to intervene. Such scenes in courtrooms cannot but breed disrespect for the law and its administration. Therefore, the claim that the prosecutor has a right to unfettered peremptory challenge must simply be denied. Too much harm can arise from irresponsible, discriminatory use of such challenges.

Another complaint about the proposed rule is that the prosecutor may not be able to state a sufficient reason to justify his use of the peremptory challenges. *People* v. *Hall*, 197 Cal.Rptr. at 77; 672 P.2d at 859. The simple answer to this contention lies in the operation of the rule. The prosecutor need not explain his actions until they give rise to a substantial suspicion, under all the circumstances of the case, that he is behaving improperly. The trial judge, naturally, will have observed the persons who are struck by the prosecutor. For example, if there is no common trait among these persons other than their race, then an explanation should be made. If the prosecutor is unable to articulate some reason sufficient to meet his relaxed burden, then under the doctrine of chances, it is only just to conclude that there is no reason for the challenges other than race discrimination.

A third objection to the rule is that it may further complicate and lengthen criminal trials that are already too long and complicated. *United States* v. *Clark*, 737 U.S. 679, 682 (7 Cir., 1984). As compared to the time that a hearing on a motion required by *Swain* with its attendant statistical evidence and witnesses would take the proceeding advocated here will mark a major simplification in the law. No proceedings will be had until the defendant convinces the trial judge that something is amiss. Then, and only then, will the prosecutor have to articulate his reasons. The trial judge who will have observed the voir dire and noticed who was struck can then make his decision. This purported objection is groundless.

The most attractive objection to the proposed rule is that which contends that any restriction of the prosecutor's right of peremptory challenge will necessarily hobble his voir dire which will in turn impair his oppor-

tunity to challenge for cause. This theme was first mentioned in *Swain* v. *Alabama*, 380 U.S. at 220-222. It was picked up in an article by Professor Barbara Babcock who stated that the peremptory challenge serves "as a shield for the exercise of the challenge for cause." 27 Stanford Law Review 545, "Voir Dire: Preserving Its Wonderful Power," at 554-555 (1975). Babcock acknowledged that vigorous questioning in an attempt to challenge for cause could well result in unexpressed anger and bias on the part of the juror questioned. Of course, a peremptory challenge can prevent that juror from sitting on the jury if the challenge for cause is denied. However, striking that juror would not give rise to a claim of improper use in the first place. Assuming that such a claim was made, the possible bias of the prospective juror should more than adequately explain why this particular juror should be excused. This objection lacks substance. An individual peremptory challenge will not be examined unless the overall pattern and number of challenges raises the probability of improper intent. Therefore, the objection should not prevent adoption of the proposed rule.

A last objection that could be raised is one asking whether the Court should adopt this rule as a matter of federal constitutional law. Members of the Court have in the recent past expressed a preference for this matter to be resolved in state courts. *McCray* v. *New York*, 461 U.S. 961, 962-963 (1983), Opinion of Stevens, J., on denial of certiorari. And there is an unmistakable inference to be made from the Court's opinions in *Oregon* v. *Haas*, 420 U.S. 714 (1975), and *Pruneyard Shopping Center* v. *Robbins*, 447 U.S. 74 (1980), that the Court will allow states wide latitude in solving, under their own constitutions, problems like the one presented here. However, the states have failed to take any action. As shown by the Appendix to the Petition for Certiorari, only four states out of the

twenty-five that have considered the problem of improper challenges, have devised new rules. Appendix to Petition for Certiorari, p. 19-20. Since the Petition was filed, the courts of Arizona and of New Jersey have considered the issue. In *State* v. *Wiley*, 698 P.2d 1244, 1255 (Ariz., 1985), the Supreme Court of Arizona refused to relinquish its allegiance to the *Swain* rule. The Appellate Division of the New Jersey Superior Court, in *State* v. *Gilmore*, 199 N.J. Super. 389, 489 A.2d 1175 (1985), essentially adopted the *Wheeler* rule on the basis of the New Jersey state constitution. Essentially, the number of jurisdictions following either *Swain* or *Wheeler* has not changed. Nor does it seem likely to. *People* v. *Nurse*, 475 N.E.2d 1000 (Ill. App. 1 Dist., 1985). Therefore, the duty to declare the law falls to this Court, which is the one legal and moral authority created by the Constitution to ensure the rights of the people. The Court must act on this problem and must grant the relief here prayed for.

(G) Application To The Present Case And Conclusion

In this case, 45 potential jurors were brought to the courtroom for examination and service at the trial of James Batson. Eight (8) were challenged and excused for cause (Tr, p. 119-120). On behalf of the Commonwealth of Kentucky, the Assistant Commonwealth Attorney exercised all of his peremptory challenges. He struck four black persons and two white persons. (App., p. 3). The swearing of the jury was objected to and a new panel of jurors was requested (App., p. 3-4). However, the trial judge overruled both motions, and the trial took place in front of an all white jury (App., p. 3-4). The application of the remedy proposed here is obvious. A disproportionate number of peremptory challenges were expended by the prosecutor to remove all blacks from the jury. *People* v. *Wheeler*, 148 Cal. Rptr. at 905; 583 P.2d at 764. Four of the prosecutor's six peremptory challenges were exercised to remove all black people from the jury. This certainly is sufficient showing of a strong likelihood that the strikes were used with the intention to remove all blacks from the jury because they were black. At the very least, Petitioner should have been afforded a hearing on his claim and the Assistant Commonwealth Attorney should have been required to state the reasons for his challenges. Of course, the trial court did not follow this procedure, but simply overruled the objection and motion. Ordinarily, the proper relief in these circumstances might be to vacate the judgment and remand for hearing. However, the Court must keep in mind that the trial of this case occurred in February, 1984 (App., p. 1). Over sixteen months have elapsed since the day of trial. It seems unlikely that the prosecutor would be able to recall at this late date the reason why he exercised peremptory challenges in what was then a relatively unimportant burglary case. Therefore, remand for hearing would send the

case back without assurance that the prosecutor could remember at all the reasons why he exercised his challenges or whether his memory would be accurate. Therefore, the Court is urged to reverse the Opinion of the Supreme Court of Kentucky in this case and to remand with directions to grant Petitioner a new trial.

J. DAVID NIEHAUS
Deputy Appellate Defender of the
Jefferson District Public Defender
200 Civic Plaza
719 West Jefferson Street
Louisville, Kentucky 40202
(505) 587-3800
Counsel for Petitioner

FRANK W. HEFT, JR.
Chief Appellate Defender of the
Jefferson District Public Defender
Co-Counsel for Petitioner

DANIEL T. GOYETTE
Jefferson District Public Defender
Of Counsel